IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 33 of 2003

with

CRIMIAL MISC. APPLICATION NO. 5743 IF 2003

For Approval and Signature:

HON'BLE MR.JUSTICE D.K.TRIVEDI
and
HON'BLE MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BABULAL SHANTILAL GAMETI

Versus

STATE OF GUJARAT

Appearance:

MR SR DIVETIA for RAJESH M AGRAWAL for Appellant

MR KC SHAH APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.K.TRIVEDI
and
HON'BLE MR.JUSTICE M.S.SHAH

Date of decision: 04/09/2003

COMMON ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.K.TRIVEDI)

#. The appellant original accused has challenged the judgement and order of conviction recorded by the learned Special Judge, Surendranagar dated 18.10.2002 passed in Special Case (NDPS) No. 3 of 2001, wherein, the learned Trial Judge has convicted the appellant accused for the offences punishable under Sections 22 and 22 (B) of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred as "NDPS Act" for short) and ordered to suffer RI for 10 years and fine of Rs.1 lac and in default of payment of fine, the accused has to undergo further RI for 2 years. The learned Trial Judge has also granted set off as provided under Section 428 of the Criminal Procedure Code and passed the order of disposing of muddamal articles.

#. As there was delay in filing the appeal, the appellant had alongwith appeal, filed an application for condonation of delay and the Court had after considering the application for delay filed by the applicant accused, condoned the delay and the present appeal was admitted as per order dated 3.3.2003.

#. As found from the appeal memo, the appellant accused has challenged the order of conviction and sentence passed by the learned Trial judge on various grounds and one the grounds taken in the appeal memo is that the sentence awarded by the learned Trial Judge, as according to appellant, looking to the prosecution case itself, from the possession of the accused 1800 grams of Ganja was found on 13.8.2001 and as Section 41 of the NDPS Act was amended, and as per the amended NDPS Act, which came into force from 2.10.2001, looking to the substance Ganja, which was found from the possession of the accused on 13.8.2001, the amended Act was applicable and the learned Trial Judge has after convicting the accused, has heard the accused on the point of sentence and after hearing the accused and learned APP, he has awarded sentence by relying upon the old Act and accordingly, the appellant has also pressed in service that ground that the order passed by the learned Special Judge on the point of sentence is also deserves to be set aside.

#. During the pendency of the appeal, the appellant had filed one application being Criminal Misc. Application No. 5743 of 2003, wherein, the applicant accused has prayed for bail during the pendency of the appeal. The

applicant had also highlighted in the application about the facts of the case, where, the accused was apprehended with narcotic substance namely 1800 grams of Ganja from his possession on 13.8.2001. As found from the application, the quantity of ganja namely 1800 grams possessed by the applicant accused was not considered to be as small quantity as prescribed under the Act. However that quantity prescribed for commercial quantity and the quantity found from the applicant accused is less. In the application, the applicant had also relied upon the table of Standing order 1055 (E) dated 19.10.2001 and the item mentioned in the said order. The Ganja, which was found from the possession of the accused is shown at Sr. No. 55 and the standard prescribed, which is reflected in column Nos. 5 and 6, the small quantity of Ganja is 1000 grams and commercial quantity reflected in Column No. 6 is of 20 Kgs. It is the case of the applicant that quantity of Ganja, which was seized from the possession of the accused is not of a small quantity as well as less quantity as prescribed under the Commercial quantity and in view of the amended provisions of the Act, the appellant accused has placed reliance upon Section 41 as amended.

#. Considering the application for bail, the Court had issued Rule and the said application for delay was to consider by the Court on the returnable date i.e. on 11.8.2003. Considering the application for bail and considering the submissions made by the counsel appearing for the appellant that without considering the prayer for bail, in view of the amended provisions in the Act and unreported decisions of this Court, he is not pressing the appeal on merit and requested that the appeal be disposed of in light of the unreported decisions of this Court by remanding the matter back to the learned Trial Judge with a direction that appellant accused be heard on the point of sentence in view of the amended provisions of the Act and further that the liberty be granted to the appellant accused to the accused to challenge the legality of the judgement on merits including the conviction before the appropriate forum.

#. Considering the request made before us, we had as per order dated 18.8.2003 called for the R&P from the Trial Court by directing the office that said R&P has reached to this court on or before 25.8.2003 and accordingly, the R&P of Special (NDPS) Case No. 3 of 2001 is received by the Registry of this court from the Trial Court.

#. We have heard Mr. Divetia, learned advocate, who appeared for the appellant and Mr. K.C. Shah, learned

APP for the respondent State. Mr. Divetia has while taking us through the order of conviction and sentence, has highlighted that looking to the order passed by the learned Special Judge, after convicting the accused for the offence under Section 8 (c) read with Section 22 (B) and Section 22 of the NDPS Act, the Court had heard the accused on the point of sentence and as found from the observation made by the learned Trial Judge, even after hearing on the point of sentence, which has been reflected in para 43 of the judgement, that the learned Special Judge has considered that the prosecution has established that from the possession of the accused, 1800 grams of Ganja was found and he has committed offence under Sections 22 and 22 (B) of the NDPS Act and as per the provisions of the Act, the minimum sentence that has been provided under the Act is RI for 10 years and fine of Rs.1 lacs and the maximum sentence that can be imposed on accused is RI for 20 years and fine of Rs.2 lacs. The learned Special Judge, has after considering the submissions made by the appellant accused on the point of sentence, has imposed minimum sentence as provided under the Act as RI for 10 years and fine of Rs.1 lac and in default of payment, RI for 2 years.

#. Mr. Divetia, learned advocate has while challenging the order of sentence, has placed reliance upon three unreported judgements of this court, which were also annexed along with the memo of appeal. The first decision is in the matter of ASARAFKHAN RUSTAMKHAN PATHAN VS. STATE OF GUJARAT, in Criminal Appeal No. 79 of 2002, wherein the Division Bench consisting of Hon'ble Mr. Justice J.M. Panchal and Hon'ble Mr. Justice J.R. Vora and speaking from the bench of brother Mr. Justice J.M. Panchal, considering the amended provisions of the Act, the Division Bench of this court has in para 7 observed, which we reproduce hereunder :-

"para 7. For the foregoing reasons, the appeal succeeds as indicated above. The decision on merits at this stage is not challenged by the learned counsel for the appellant and therefore the findings recorded by the learned Judge on merits are not interfered with at all at this stage. The matter is remanded to the learned Judge who shall consider the aspect of the imposition of punishment in the light of amended provisions of Section 21 of the Act and circumstances which may be pointed out by the appellant regarding imposition of sentence on him. It is clarified that after the fresh order

is passed by the learned Judge of the Trial Court imposing punishment, it would be open to the appellant to challenge the legality of the judgement including merits of the case before the appropriate forum. The appellant shall be heard regarding imposition of sentence by the learned Judge as early as possible and without any avoidable delay. Appeal is accordingly allowed."

In the said case, the Narcotic substance was seized from the accused on 30.5.2000 and the Division Bench had accordingly, when appeal was examined on the point of sentence, in light of the amendment made in the NDPS Act, the matter was remanded back to the trial Court only to consider the aspect of imposition of punishment in light of amended provisions of Section 21 of the Act.

#. The another decision is in the matter of NATHSING DILIPSING JAT SHAIKH VS. STATE OF GUJARAT, in Criminal Appeal No. 661 of 2002 decided on 16.9.2002, wherein, the Division Bench consisting of Hon'ble Mr. Justice N.G. Nandi and Hon'ble Mr. Justice D.P. Buch, and speaking from the bench of brother Mr. Justice N.G. Nandi, on examining the contentions raised in the appeal and considering the amended provisions of the Act, had allowed the appeal and remanded the matter back to the trial Court to consider and hear the accused on the point of sentence as per amended provisions of the Act and it was also clarified that the appellant accused has not challenged the order of conviction on merits and the liberty was granted in favour of accused that even after hearing the accused on the point of sentence, he can challenge the order of conviction and sentence on merits before the appropriate forum.

##. The last judgement is in the matter of MAHENDRA VARMA JUGAN MAHANTO VS. STATE OF GUJARAT, in Criminal Appeal No. 943 of 2002, wherein, the Division Bench of this Court, consisting of Hon'ble Mr. Justice A.L. Dave and Hon'ble Mr. Justice Akshay H. Mehta and speaking from the bench of brother Mr. Justice A.L. Dave, had in the similar way, allowed the appeal and remanded the matter back to the trial Court with a direction to the trial Court to hear the accused on the point of sentence as per amended provisions of the Act and liberty was also granted to the accused to challenge the legality of the judgement on merits including the conviction before the appropriate forum.

##. Considering the above three unreported decisions of this Court, which are squarely applicable to the facts of

the present case and even as per the prosecution case, on the faithful day i.e. on 13.8.2001, from the possession of the accused 1800 grams of Ganja was seized and as observed earlier, the amendment in the NDPS Act came into force from 2.10.2001 and the Ganja was found from the accused on 13.8.2001 and the learned trial Judge has after recording the order of conviction, though had heard the accused on the point of sentence, however, as found from the order of sentence passed by the learned Trial Judge, the learned Trial Judge had in term, while imposing sentence, had observed that the minimum sentence, as provided under the Act was imposed to the accused and the minimum sentence, even as per old Act was RI for 10 years and fine of Rs.1 lac and in default of payment, further RI for 2 months and the learned Trial Judge has imposed the said minimum sentence on the accused. Mr. Divetia, learned advocate has also similarly not challenged the the order of conviction on merits, however, he prays that liberty be reserved in favour of appellant accused to challenge the legality of the judgement on merits including the conviction before the appropriate forum.

##. In view of the above unreported three decisions of this court and the facts of the present case, Mr. K.C. Shah, learned APP is not in a position to take another view in the matter.

##. Accordingly, appeal is partly allowed. The matter is remanded to the trial Court only with a direction to consider the aspect of imposition of quantum of punishment in light of the amended provisions of NDPS Act. The appellant is not pressing conviction on merits at this stage, with a liberty to challenge the legality and validity of the judgement on merits as well as on the point of sentence before the appropriate forum after the matter is decided by the learned Trial Judge. Matter is accordingly remanded, as aforesaid, only for the limited purpose of reconsidering the question of quantum of punishment after hearing the accused and the counsel for the parties. The trial Court shall accordingly hear the accused on the point of sentence and decide the matter as early as possible. The Registry of this court is directed to transmit forthwith the R&P of Special Case (NDPS) No. 3 of 2001 in favour of learned Trial Judge.

In view of order passed in Criminal Appeal No. 33 of 2003, Criminal Misc. Application No. 5743 of 2003 does not survive and the same stands disposed of accordingly. Rule is discharged.

Date : 04.09.2003 (D.K. Trivedi, J.)

(M.S. Shah, J.)

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